

Clerk File No. 310739

Clerk File No. 310739  
2009 Annual Report of the Office of the  
Hearing Examiner.

### The City of Seattle – Legislative Department

Clerk File sponsored by: *Erin V. Linn*

Related Legislation File: \_\_\_\_\_

Date Introduced and Referred: <b>4.26.10</b>	To: (committee): <b>Built Environment</b>
Date Re-referred: <b>June 1, 2010</b>	To: (committee): <b>Full Council</b>
Date Re-referred:	To: (committee):
Date of Final Action: <b>6.7.10</b>	Disposition: <b>Filed</b>

4.26.10  
**Date Filed with City Clerk**

By *[Signature]*

**Committee Action:**

Date	Recommendation	Vote

This file is complete and ready for presentation to Full Council. \_\_\_\_\_

**Full Council Action:**

Date	Decision	Vote
<b>6.7.10</b>	<b>Filed</b>	<b>9-0</b>

**City of Seattle**



**OFFICE OF HEARING EXAMINER**

**2009**

**ANNUAL REPORT**

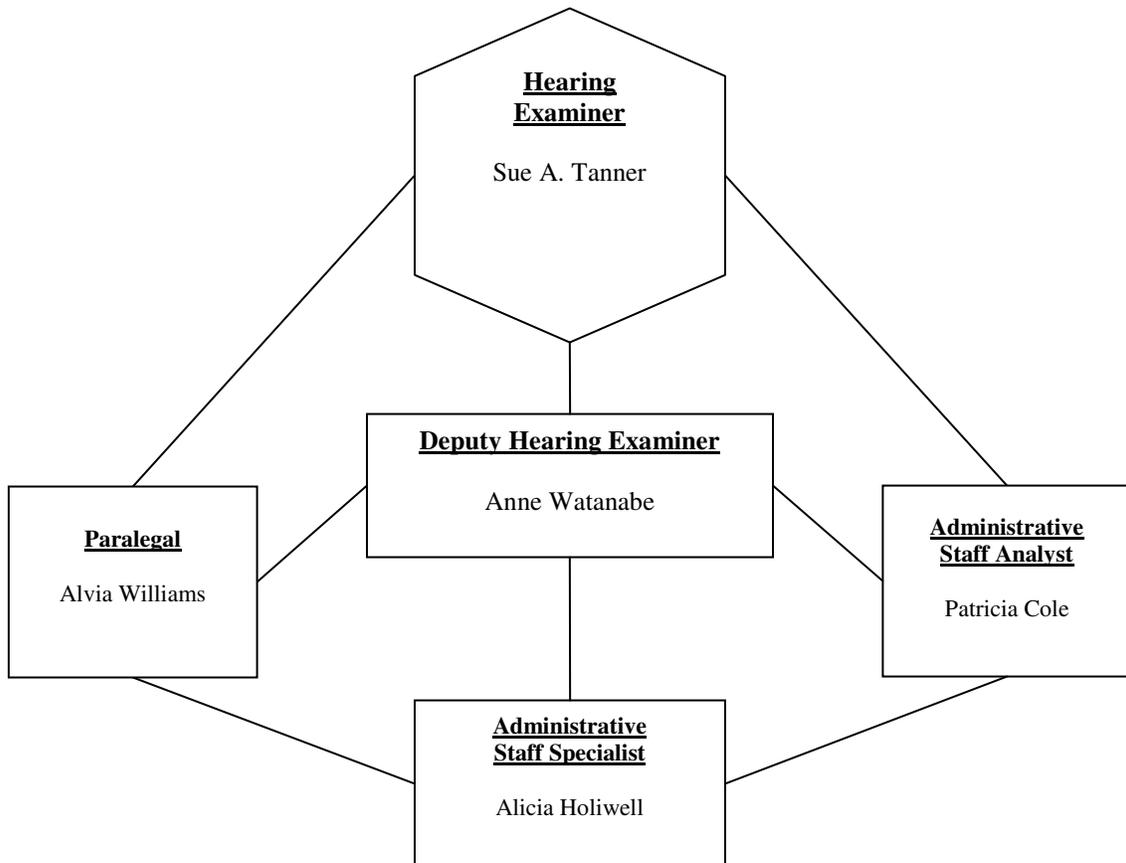
Office of Hearing Examiner  
Seattle Municipal Tower, Suite 4000  
700 5th Avenue  
Seattle, Washington 98104  
Phone: (206) 684-0521  
Fax: (206) 684-0536

**February 2010**

City of Seattle  
**CITY COUNCIL**

SALLY BAGSHAW  
TIM BURGESS  
SALLY CLARK  
RICHARD CONLIN, PRESIDENT  
JEAN GODDEN  
BRUCE HARRELL  
NICK LICATA  
MIKE O'BRIEN  
TOM RASMUSSEN

**2009 Organizational Chart**



**CITY OF SEATTLE  
OFFICE OF HEARING EXAMINER**

**2009 ANNUAL REPORT**

**Mission and Authority**

The mission of the Office of Hearing Examiner is to conduct fair and impartial administrative hearings in matters where jurisdiction has been granted by the Seattle Municipal Code, and to issue clear and timely decisions and recommendations that are consistent with applicable law.

The position of Hearing Examiner is established in the Seattle Municipal Code, and the Hearing Examiner is appointed by the City Council to serve an initial term of one year and subsequent terms of four years. The Hearing Examiner is responsible for all functions of the Office and is authorized to appoint Deputy Examiners and other staff. The inside front cover of this report shows the organization chart and Office staff for 2009.

The Office of Hearing Examiner is created as a separate and independent City office under Chapter 3.02 of the Seattle Municipal Code. Before the Office was created in 1973, some appeals of administrative decisions were heard by the City Council; others went directly to court. Pursuant to authority conferred throughout the Code, the Office of Hearing Examiner now provides an independent hearing forum to review decisions made by many City agencies and provide recommendations to the City Council on some land use applications.

**Jurisdiction**

The Office of Hearing Examiner currently has jurisdiction over more than 75 different types of matters.<sup>1</sup> We track all cases that come into the Office as “Cases Filed”. The most numerous of these are appeals of decisions made by other City agencies, such as the Department of Planning and Development (Master Use Permits, SEPA determinations, Code Interpretations, Land Use and Noise Enforcement Citations and decisions on tenant relocation assistance); the Department of Finance (tax assessments); the Landmarks Preservation Board and Special Purpose District Commissions (decisions on certificates of approval for alterations); the Department of Executive Administration (licensing decisions); and the Department of Transportation (right-of-way use).

When the Hearing Examiner has original jurisdiction, the Examiner makes the initial decision in a case rather than reviewing another department’s decision. Original jurisdiction cases include subdivision applications processed by the Department of Planning and Development; complaints of discrimination in employment, housing, public accommodation, or public contracts filed by the Office for Civil Rights and the City Attorney’s Office; complaints for third party utility billing violations; petitions for review of floating home moorage fee increases; and others.

---

<sup>1</sup> See complete list at pp. 17-18.

The City Council has retained jurisdiction over certain land use actions, including Council Conditional Uses, rezone proposals, major institution master plans, planned unit developments, and landmark controls and incentives. For these cases, the Hearing Examiner holds a public hearing for the Council, gathers information to establish the record, and forwards the record and a detailed written recommendation to the Council for its use in making the decision.

### **Accessibility**

An administrative hearing before the Hearing Examiner is a quasi-judicial process, which involves the application of existing law and policy to the specific facts of a case. Constitutionally guaranteed due process requires procedural safeguards for those whose rights are affected by the outcome of the case. The hearing format resembles an informal court proceeding and is structured to provide a fair opportunity for each party to participate, while also reflecting the seriousness of the matters appealed for those involved.

The Office of Hearing Examiner uses several tools to make the hearing process understandable and “user friendly,” while at the same time protecting the rights of parties and fulfilling legal requirements. Examples include: a “Citizen Guide” booklet that explains the hearing process in a question and answer format; “fill-in-the-blanks” appeal forms; an explanatory letter that is sent along with the notice of hearing in each case; and two pocket-sized pamphlets that include basic information about the hearing process and are available from the Office, neighborhood centers, and most libraries. In addition, the pamphlet on Code enforcement citation hearings is included with each citation issued. Where indicated, a card in one of the City’s six core languages, or Russian, is handed out with a citation. The card explains what basic hearing-related information is available from the Office of Hearing Examiner. We also solicit feedback from those who participate in hearings. A “Customer Satisfaction Survey” is available in our office and hearing rooms, as well as on-line, and may be completed anonymously.

The Hearing Examiner’s website, at [www.seattle.gov/examiner](http://www.seattle.gov/examiner) includes the Hearing Examiner Rules, the “Citizen Guide,” appeal forms, a schedule of upcoming hearings, the “Customer Satisfaction Survey,” the most recent Annual Report, and information on making a request for disclosure of public records. Decisions dating back through 1990 are also available in a searchable database through a link on the website.

### **Contracting**

Since 2004, the Hearing Examiner has been authorized by Seattle Municipal Code to provide hearing examiner services to other jurisdictions via contract. We currently provide contract examiner services to five cities: Kirkland, Mercer Island, Puyallup, Shoreline and Tukwila. Our work for contract cities was noticeably reduced in 2009. We conducted 17 hearings and issued 17 decisions for them, compared with 25 hearings conducted and 23 decisions issued in 2008. With the addition of the City of Puyallup in late 2009, we anticipate that our overall caseload for contract cities will remain level or increase in 2010. Working with other cities continues to add variety to our case load and keeps us flexible.

## **Judicial Appeals of Hearing Examiner Decisions**

At the request of the City Council, and with the assistance of the City Attorney's Office, the Office of Hearing Examiner tracks the results of judicial appeals of Hearing Examiner decisions. The following appeals were decided in 2009:

In *Vonage v. City of Seattle*, King Cy. Superior Ct. #07-2-15735-6SEA, the superior court affirmed the Hearing Examiner's decision that a company providing digital voice communications through Voice Over Internet Protocol is in the "telephone business" as defined in the Code. The court reversed the Examiner's determination that under the Code's language, the taxpayer was required to prove what percentage of the company's calls were intrastate and subject to the City's B&O tax. The decision was appealed to the court of appeals, which affirmed the superior court, but clarified the remand instructions. However, the parties settled the case before the Examiner scheduled a remand hearing.

In *Friends of Cedar Park Neighborhood v. City of Seattle*, King Cy. Superior Ct.#08-2-29531-1SEA, the superior court affirmed a decision by the Hearing Examiner upholding a DPD decision to approve a short subdivision of property located in an environmentally steep slope area. The case has been appealed to the court of appeals.

*Maple Leaf Community Council v. City of Seattle*, King Cy. Superior Ct.#08-2-32517-2SEA, concerned a decision by the Hearing Examiner upholding DPD's issuance of design review approval and a SEPA Determination of Nonsignificance for a proposal to construct 39 housing units and underground parking on a site in the Maple Leaf neighborhood. The superior court affirmed the decision but remanded the case to the Examiner to consider requiring a "circus tent enclosure" to mitigate air quality impacts during demolition of an old hospital on the site. However, the Applicant withdrew the application, and the appeal was dismissed.

In *Fremont Neighborhood Council et al. v. City of Seattle*, King Cy. Superior Ct.#08-2-41324-1SEA, the superior court affirmed the Hearing Examiner's decision upholding the SEPA Determination of NonSignificance issued by Seattle Public Utilities for reconstruction of the North Recycling and Disposal Station in Wallingford. The decision has been appealed to the court of appeals.

*Gratzer v. City of Seattle*, King Cy. Superior Ct.#08-2-09164-3SEA, involved a decision by the Hearing Examiner that a taxpayer's sales of patents were not "casual or isolated" because, under the language of former SMC 5.30.050 A.2, the taxpayer was "engaged in the business of selling the type of property involved on a routine or continuous basis." The superior court reversed the Examiner's decision, and the applicable Code language has since been amended.

In *Julian v. City of Seattle*, King Cy. Superior Ct.#08-2-27470-5SEA, the superior court affirmed a decision by the Hearing Examiner upholding a DPD decision to grant administrative conditional use approval that allowed a change of use from a single-family residence to an institution. The decision was appealed to the court of appeals, but the appeal was later withdrawn.

*Acquavella v. City of Seattle*, King Cy. Superior Ct.#08-2-39188-4SEA, involved a Hearing Examiner decision upholding a DPD Code interpretation that an owner’s short-term rental of condominium units was not a permitted accessory use in a multifamily residential zone. The superior court determined that the Code did not adequately state that a short-term vacation rental was a “lodging use,” rather than a “multifamily use,” and reversed the Examiner’s decision.

*In Byron v. City of Seattle*, Superior Ct.#08-2-27470-5SEA, the Hearing Examiner imposed the applicable penalty when a Land Use Code citation was not timely appealed. The appellant appealed to superior court, but the court dismissed the appeal.

In *Conner v City of Seattle*, King Cy. Superior Ct.#08-2-16690-5SEA, the superior court and court of appeals affirmed the Hearing Examiner’s decision upholding a decision by the Landmarks Preservation Board that denied a certificate of approval for construction of three houses on the grounds of Satterlee House, a designated landmark site in West Seattle. The developer has filed a petition for review in the Supreme Court.

In *1000-1100 Dexter Avenue v. City of Seattle*, King Cy. Superior Ct.# 09-2-26016-8SEA, the superior court affirmed a decision by the Hearing Examiner upholding a design review decision and SEPA Determination of Nonsignificance issued by DPD for a six-story office structure in South Lake Union.

The superior court had not entered orders by year’s end in appeals of two 2009 Hearing Examiner decisions: *Getty Images v. City of Seattle* King Cy. Superior Ct.#09-2-27132-1SEA; and *Salmon Bay Sand and Gravel, Inc. v. City of Seattle*, King Cy. Superior Ct.#09-2-26586-1SEA. We will report on the outcome of these appeals in the next annual report.

### **Case Highlights**

Every year includes cases that are noteworthy, either because of the controversy surrounding them or because they present important issues in the application of the Code. The brief case descriptions that follow highlight some of these cases that came before the Hearing Examiner in 2009. (The complete decision or recommendation can be found through a link at [www.seattle.gov/examiner](http://www.seattle.gov/examiner) using the Hearing Examiner case number included after each case description below.)

- An online retail business challenged a business and occupation tax assessment, arguing that it did not engage in business in the City. A key issue was whether the taxpayer’s physical presence, as opposed to a purely “economic presence,” was required in order for the City to impose taxes on the retailer. Although the taxpayer did not have a physical presence in the City, it had arrangements with local bookstores (owned by the same company that owned the taxpayer) to accept returns from the taxpayer’s customers along with returns from other book vendors. The taxpayer participated with the stores in a gift card program and a membership program, and information about the taxpayer was available at the bookstores, but the evidence did not indicate that the interactions with the bookstores had helped its market share or sales volumes. The Examiner concluded that more than an economic presence was required in order to impose the tax, and that the taxpayer’s actual activities in the City were not sufficient to make the taxpayer subject to the City’s B&O tax. (B-08-003)

- The Seattle School District proposed a substantial renovation of its Ingraham High School campus, including a building addition for new classroom space. The addition was to extend into the so-called “northwest grove,” a 1.2-acre stand of mature conifers and madrone trees. Several appellants challenged DPD’s approval of the project, arguing that the grove was a “rare” or “uncommon” plant habitat under the City’s SEPA policies. The Examiner agreed with the appellants that the conifer/madrone/salal association in the grove was an uncommon habitat, and remanded the decision to DPD for further review and evaluation of the project in light of the SEPA policies protecting uncommon plant habitats. (MUP-09-002, -003, -004 and -005)
- Neighbors of a childcare business appealed a DPD interpretation that the business met the Code’s home occupation requirements. The childcare business was owned and operated by an out-of-state entity. The owners of the business had purchased the house and hired an employee who lived in the home. The employee supervised the childcare activities at the site and at other childcare operations owned by the entity. The employee was not an owner of the business and did not control its operations, nor was she authorized to resolve complaints with neighbors about the business. The Examiner reversed the interpretation, concluding that the business was not occurring in the “home of the operator” even though the employee resided at the house, because the employee could not be considered the “operator” of the business. (S-09-001, -002 and -003)
- Does an applicant vest only to regulations in effect on the date of a complete application or also to the facts that existed on that date? This issue was raised by an appeal of a DPD decision approving a short subdivision under the Code’s “75/80” exception to minimum lot size. That exception allows the creation of a new building lot out of an existing oversized lot if the new lot would be at least 75 percent of the required minimum lot area in the zone, and at least “80 percent of the mean lot area of the lots on the same block face within which the [new] lot will be located.” The proposed short subdivision met these requirements at the time of DPD approval. But a later lot boundary adjustment increased the size of one of the lots on same block face, such that each of the new lots was no longer 80% of the mean lot area of the lots on that block face. The Examiner agreed with the appellants that the law does not provide for an applicant to vest to facts, such as the size of nearby lots, so those facts are subject to change until the decision on the proposal is final. The Code provides that if a short subdivision (or any Type II Master Use Permit) is appealed, it may not be “approved for issuance” until the fourth day following the final administrative appeal decision. Therefore, the Examiner agreed with the appellants that the controlling facts were the ones in existence at the close of the record on appeal. Under those facts, the lots in the proposed short subdivision did not meet the 75/80 exception to minimum lot size, and the Examiner reversed the DPD decision approving it. (MUP-09-017)

- Several Ballard businesses appealed the Determination of Nonsignificance (DNS) issued by the Seattle Department of Transportation (SDOT) for construction of the “missing link” of the Burke Gilman trail, which would extend the trail from its terminus at 11<sup>th</sup> Avenue Northwest to the Ballard Locks. The Cascade Bicycle Club intervened in the appeal to support SDOT's decision. The businesses alleged that SDOT failed to disclose or discuss the project’s inconsistencies with comprehensive plan goals and policies, incompatibility with existing uses, impacts on access to property and impacts on traffic, parking and the demand for public services. The Examiner acknowledged the businesses’ intense disagreement with the decision to locate the trail within a busy industrial area, but concluded that they had not shown that SDOT's DNS was clearly erroneous. Therefore, the Examiner affirmed the DNS. The decision is on appeal to superior court. (W-08-007)
- Seattle Children’s Hospital applied for approval of a new Major Institution Master Plan, and the Laurelhurst Community Club appealed the final environmental impact statement (FEIS) issued under SEPA for the Master Plan. After holding a consolidated hearing on the Master Plan and FEIS appeal, the Examiner concluded that the FEIS was inadequate for failing to present a reasonably thorough discussion of probable significant housing and land use impacts. The Examiner reversed the FEIS and remanded the Master Plan to DPD for reconsideration. A Revised Final Environmental Impact Statement (RFEIS) was issued, and DPD reaffirmed its prior decision approving the Master Plan. The Examiner held a second consolidated hearing on the Master Plan and Laurelhurst Community Club's appeal of the RFEIS. The Examiner concluded that the RFEIS presented a reasonably thorough discussion of the probable significant housing and land use impacts of the Master Plan and affirmed DPD's decision that the total FEIS was adequate. However, the Examiner recommended denial of the Master Plan because, given the proposal’s location, its significant traffic, and height, bulk and scale impacts could not be sufficiently minimized as required by the Code, and the requested height district rezone was inconsistent with some of the Code’s zoning principles and criteria for selecting appropriate heights for a major institution overlay. Several appeals of the recommendation were filed with the City Council, which will decide whether to approve the Master Plan in some configuration. (MUP-08-035, MUP-09-015 and CF3088840)

### **2009 Caseload**

Table 3, on page 14, presents a complete summary of case activity for 2009. “Cases Filed” and “Decisions Issued” are discussed in more detail below.

**Table 1 – 2009 Cases Filed**

	2009	2008	2007	2006	2005	2004	Previous 5-Yr. Average (04-08)
<b>B&amp;O TAX ASSESSMENTS</b>	14	6	10	14	12	14	11
<b>COUNCIL RECOMMENDATIONS</b>	6	9	1	10	7	2	6
<b>LAND USE CODE INTERPRETATIONS</b>	15	8	6	0	2	2	4
<b>LANDMARKS/SPECIAL REVIEW DISTRICT (Pioneer Sq., Pike Market, ID, etc.)</b>	4	5	5	5	11	7	7
<b>LICENSING (taxis, adult entertainment, etc.)</b>	12	17	19	12	10	21	16
<b>MASTER USE PERMITS (MUP)</b>	22	39	39	44	39	29	38
<b>OTHER JURISDICTIONS (Public Nuisance, Third Party Billing, etc.)</b>	39	19	26	30	23	34	26
<b>SEPA-only Appeals (non MUP)</b>	2	7	2	3	10	5	5
<b>TENANT RELOCATIONS</b>	7	7	18	23	15	10	15
<b>TOTAL WITHOUT CITATIONS</b>	121	117	126	141	129	124	128
<b>LAND USE CITATION ENFORCEMENT ACTIONS</b>	341	361	316	214	209	170	254
<b>SDOT CITATION ENFORCEMENT ACTIONS</b>	99	161	65	125	47	98	99
<b>GRAND TOTAL</b>	561	639	507	480	385	392	481

**Non-Citation Cases Filed**

There were 121 Non-Citation cases filed with the Office of Hearing Examiner in 2009, a number midway between the 117 filed in 2008 and the 126 filed in 2007.

Appeals from business and occupation **tax assessments** were definitely up in 2009. Fourteen appeals were filed, compared to the 6 filed in 2008. That number exceeds the previous five-year average.

There were slightly fewer cases requiring **recommendations to Council** filed in 2009 (6) than in 2008 (9), equal to the previous five-year average.

There was again an unusually high number of **Land Use Code interpretation** appeals (15) filed in 2009. The previous five-year average is 4.

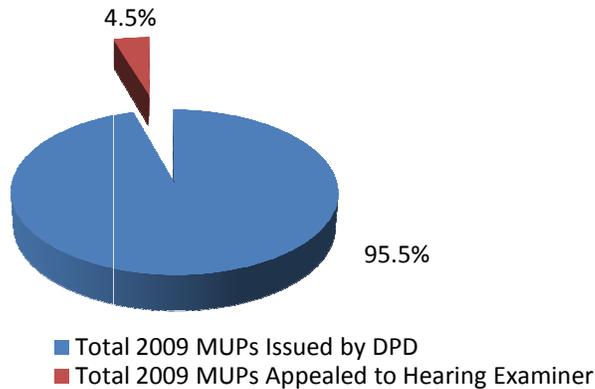
There were 4 **landmark and special district appeals** filed in 2009, one below the number filed during each of the previous three years.

Just 12 **appeals of license suspensions** were filed in 2009, down from the number in 2009 (17) and 2007 (19), and below the five-year average of 16. All appeals but one were related to adult entertainment license suspensions.

A **Master Use Permit, or MUP**, is a document issued to a permit applicant that includes all land use decisions made by the Department of Planning and Development on the application. MUP appeals are some of the most complex matters handled by the Hearing Examiner, as they often involve multiple parties, complicated facts, substantial controversy, several days for hearings and considerable time for review and decision-writing.

The number of MUP appeals has held steady between 39 and 44 for several years. Predictably, that number fell in 2009 to 22, down from 39 in 2008. Of the 477 MUPs issued by the Department of Planning and Development, just over 4.5% were appealed. This is just slightly higher than the appeal rates during the last four years.

**2009 Master Use Permit Case Activity**

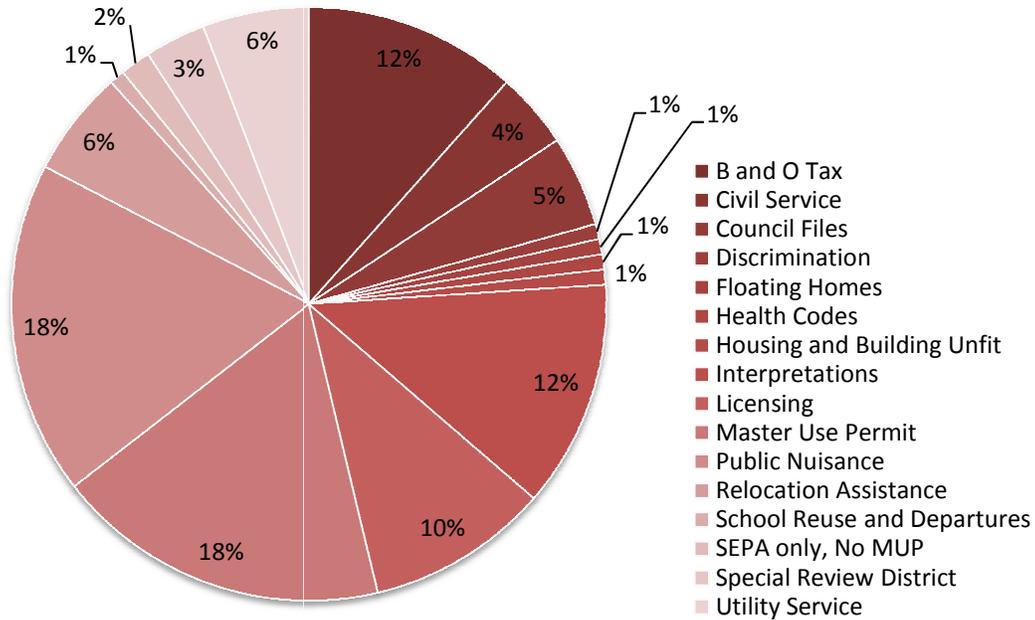


**SEPA-only appeals** are appeals of environmental determinations made for two types of proposals: 1) proposals, such as legislation, that do not require a MUP or a Council land use decision; and 2) proposals that require a MUP or a Council land use decision, but for which a department other than DPD makes the environmental determination on the proposal. The number of SEPA-only appeals (2) was back to its normal range of 2 to 3 per year, down from 7 in 2008.

**Appeals from denials of tenant relocation assistance** (7) remained very low compared to 2005 (15), 2006 (23) and 2007 (18).

The number of **civil service appeals** assigned to the Hearing Examiner by the Civil Service Commission in 2009 (5) was slightly higher than the number assigned in 2008 (3).

### 2009 Non-Citation Cases Filed by Type



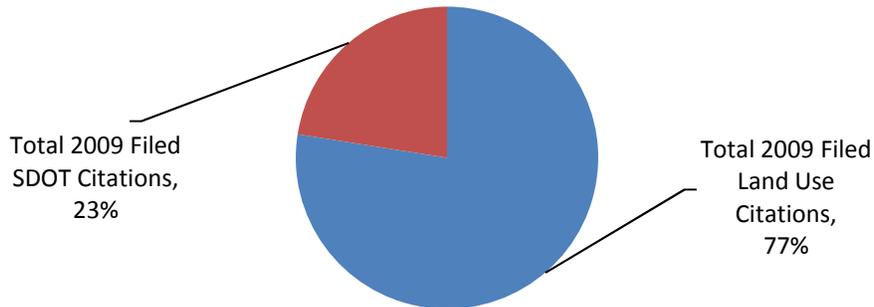
### Citation Enforcement Cases Filed

Because citation enforcement cases follow a unique procedure, we track them separately from other categories of cases. When citations are issued, a copy is sent to the Office of Hearing Examiner. When someone files an appeal of a citation, the citation is removed from the others and set up for an appeal hearing and decision. For citations that are neither paid nor appealed, the Office of Hearing Examiner prepares and sends out orders of “default” which note the failure of the party to respond, find that the violation has been committed and impose the cited penalty, as required by the Code.

**Land Use Code citation cases** filed in 2009 (341) were off by 20 from the all-time high of 361 cases filed in 2008, but remained well above the previous five-year average.

**SDOT citation cases** (use of right-of-way without a permit, vending in a no-vending area, etc.) are similar to Land Use Code citations, and they are reflected in the “Citation” category of cases in the tables. In 2003, the first full year of SDOT enforcement activity, 35 appeals were filed. That number rose to an all-time high of 161 in 2008, but dropped to just 99 in 2009. The decline was primarily in citations issued for sales of tickets to sporting events in a no-vending zone.

### 2009 Citations Filed by Type



### Prehearing, Hearing and Decision Activity

**Prehearing Conferences.** The Office of Hearing Examiner held 28 prehearing conferences in cases scheduled for hearing in 2009. Under the Hearing Examiner Rules, prehearing conferences can be held at the request of either a party or the Hearing Examiner. The conferences are designed to organize and prepare a case for hearing, including clarifying the issues to be addressed, determining the parties' interest in mediation, facilitating disclosure of each party's intended witnesses and exhibits, and establishing a case schedule for prehearing motions and other matters. Following the conference, the Examiner normally issues a prehearing order memorializing any agreements reached or rulings made at the conference. Prehearing conferences are usually held in MUP, SEPA, civil service and tax appeals, and are scheduled in other types of cases as needed.

**Prehearing Decisions.** Prehearing motions are frequently filed in land use, landmark, SEPA, tax and civil service cases. Most are on substantive or procedural legal issues that the parties can address fully in written memoranda. While they often require legal research and writing, prehearing motions do not always require a separate hearing before the Examiner issues a written decision on them. These decisions affect whether and how a case proceeds to hearing by narrowing the issues, or determining in advance whether certain testimony or evidence will be admissible at hearing. Consequently, most prehearing decisions are appealable as part of an appeal of the final decision in a case. Because work on dispositive prehearing motions involves considerable Examiner time, the Office of Hearing Examiner includes them in the "decisions issued" category of annual statistics.

**Hearings:** The length of a hearing before the Hearing Examiner depends upon many variables, such as the type and complexity of a case, the number of witnesses, and the parties' level of preparation and expertise in the subject area. Consequently, one case may take less than an hour to hear, while another case may require several hearings and/or several days to hear. Because of the great variety in the types of cases that come before the Office of Hearing Examiner, we do not track the number of hearing hours, or hearing days, per case. All hearings held on each case are counted together as one hearing.

**Total decisions:** In 2009, the Office of Hearing Examiner issued a total of 202 decisions in City of Seattle cases. That number is higher than the number issued in any of the last five years. These include decisions issued after a full, evidentiary hearing, and those issued following submittal of legal memoranda and exhibits and sometimes oral argument on a party's motion for full or partial dismissal of a case. We also issued 17 decisions in other cities' cases.

**Table 2 – 2009 Decisions Issued**

	2009	2008	2007	2006	2005	2004	Previous 5-Yr Average (04-08)
<b>B&amp;O TAX ASSESSMENTS</b>	10	3	8	10	6	6	7
<b>COUNCIL RECOMMENDATIONS</b>	5	7	2	10	7	2	6
<b>LAND USE CODE INTERPRETATIONS</b>	6	4	2	0	2	2	2
<b>LANDMARKS/SPECIAL REVIEW DISTRICT (Pioneer Sq., Pike Mrkt, ID, etc.)</b>	1	6	2	4	7	7	5
<b>LICENSING (taxis, adult entertainment, etc.)</b>	17	2	23	0	12	18	11
<b>MASTER USE PERMITS (MUP)</b>	30	37	27	32	36	25	31
<b>OTHER JURISDICTIONS (Public Nuisance, Third Party Billing, etc.)</b>	11	2	7	7	11	5	6
<b>SEPA-only Appeals (non MUP)</b>	3	5	1	5	5	1	3
<b>TENANT RELOCATIONS</b>	4	6	24	16	12	9	13
<b>TOTAL WITHOUT CITATIONS</b>	87	72	84	98	75	65	84
<b>LAND USE CITATION ENFORCEMENT ACTIONS</b>	77	94	34	43	60	83	63
<b>SDOT CITATION ENFORCEMENT ACTIONS</b>	38	22	19	16	36	4	19
<b>GRAND TOTAL</b>	202	188	137	157	171	152	161

**Non-Citation Decisions Issued**

The number of **B&O Tax appeals** decided in 2009 (10) was more than three times the number decided in 2008 (3) and above the five-year average of 7.

Because **recommendations to Council** on land use actions involve the same hearing, research, record review and writing time required for MUP decisions, they are included in the total decision figures in Tables 2 and 3. There were just 5 recommendations to Council in 2009, down from the 7 issued in 2008 and below the previous five-year

average of 6. One recommendation involved a proposed major institution master plan; the rest were on rezone applications.

Six **Land Use Code Interpretation** decisions were issued in 2009, slightly above the number issued in 2008 (4) and triple the five-year average.

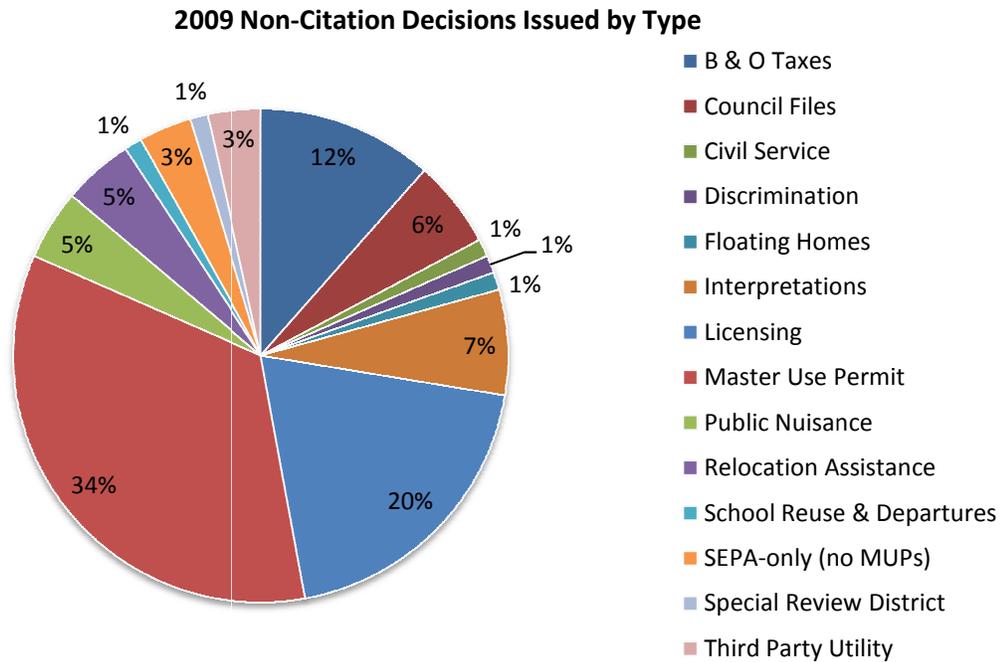
Only one decision was issued in a **landmarks and special districts** appeal, which is well below the previous five-year average

Seventeen **licensing appeal decisions** were issued in 2009, back up from the 2 issued in 2008 and well above the previous five-year average of 11.

The greatest number of decisions issued in a non-citation jurisdiction was 30 for **MUP appeals**. Again, predictably, this number was below the 37 MUP decisions issued last year, but it was only slightly below the previous five-year average.

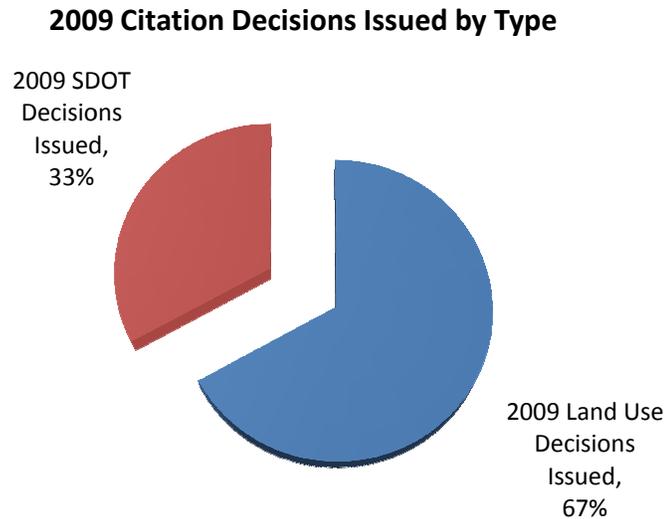
Three decisions were issued in **SEPA-only appeals** in 2009, which is equal to the average for the previous five years.

The number of decisions issued on **appeals of denials of tenant relocation assistance** (4) was down slightly from the number issued in 2008 (6) and well below the number issued in 2007 (24).



## Citation Decisions Issued

In **Land Use Code citation appeals**, 77 decisions were issued, which is down from the 94 decisions issued in 2008, but much higher than the number issued in three of the five preceding years. In **SDOT citation appeals**, 38 decisions were issued, which was higher than the number issued in any of the preceding five years.



## Disposition of Appeals to the Hearing Examiner

At the request of the Council, the Office of Hearing Examiner includes in the Annual Report a breakdown of the outcome of cases appealed to the Hearing Examiner. Table 4 shows the disposition of appeals by type of case, and is followed by an explanation of the standard of review the Examiner must use for each type.

In 11% of the appeals for which the Examiner issued a final order or decision, the appeal was dismissed, usually at the request of the appellant. The Examiner affirmed the City decision being appealed in 49% of the appeals, modified and affirmed the decision being appealed in 1.5% of the appeals, affirmed the decision being appealed but reduced the penalty in 31% of the appeals, and reversed the decision of the Department in 7.5% of the appeals.

**Table 3 – 2009 Case Activity Summary**

	2009 Cases Filed				2009 Case Disposition			
	Pending Cases at Start of Year	Cases Filed	Total Caseload	Cases Heard *	Decisions Issued *	Cases Dismissed (No Hearing)	Defaults Issued (Untimely )	Pending Cases at End of Year
B & O TAXES	5	14	19	11	10	1	0	7
CIVIL SERVICE	0	5	5	1	1	1	0	3
COUNCIL RECOMMENDATIONS	1	6	7	4	5	0	0	3
DISCRIMINATION***	2	1	3	1	2	2	0	0
FLOATING HOMES	0	1	1	0	1	0	0	0
HEALTH CODE	0	1	1	0	0	0	0	1
HOUSING	1	1	2	0	0	1	0	1
INTERPRETATION***	1	15	16	12	6	4	0	0
LICENSING	13	12	25	17	17	6	0	2
MASTER USE PERMIT (MUP) ***	10	22	32	28	30	1	0	3
PUBLIC NUISANCE	0	22	22	2	2	20	0	0
SCHOOL REUSE	0	1	1	1	1	0	0	0
SEPA-ONLY ***	1	2	3	1	3	2	0	0
SPECIAL REVIEW DISTRICT	0	4	4	1	1	3	0	0
TENANT RELOCATION	0	7	7	4	4	3	0	0
THIRD PARTY BILLING	1	7	8	4	4	1	0	3
<b>TOTAL</b>	35	121	156	87	87	45	0	23
<b>CITATION ENFORCEMENT</b>	<b>Pending Appeals at Start of Year</b>	<b>Cases Filed</b>	<b>Total Caseload</b>	<b>Cases Heard</b>	<b>Decisions Issued *</b>	<b>Cases Dismissed (No Hearing) **</b>	<b>Defaults Issued</b>	<b>Pending Appeals at End of Year</b>
DPD (Land Use Code)	18	341	359	79	77	41	203	33
SDOT (Use of Public Property)	4	99	103	38	38	15	33	12
<b>TOTAL CITATIONS</b>	22	440	462	117	115	56	236	45
<b>TOTAL INCLUDING CITATIONS</b>	57	561	618	204	202	101	236	68

\* indicates some cases in category were pending from prior years or will carry-over into subsequent years

\*\* indicates rescinded citations, posthumous dismissals, or fines paid prior to default

\*\*\* indicates some cases in category may have multiple hearings or decisions

**Table 4 - Disposition of Appeals\***

	Affirmed	Affirmed, as Modified	Affirmed, Penalty Reduced	Reversed	Remanded	Dismissed	Total
B & O TAXES	7			3			10
CIVIL SERVICE	1						1
DISCRIMINATION						1	1
INTERPRETATIONS	8			3		1	12
LICENSING	12			1		4	17
MASTER USE PERMIT	12	3		6		1	22
PUBLIC NUISANCE	2						2
SCHOOL USE & DEPARTURES	1						1
SEPA-ONLY	1						1
SPECIAL REVIEW DISTRICT				1			1
TENANT RELOCATION	3					1	4
<b>Sub-Total</b>	<b>47</b>	<b>3</b>	<b>0</b>	<b>14</b>	<b>0</b>	<b>8</b>	<b>72</b>
DPD (Land Use Code)	27		46			4	77
SDOT (Use of Public Property)	18		12			8	38
<b>Sub-Total</b>	<b>45</b>	<b>0</b>	<b>58</b>	<b>0</b>	<b>0</b>	<b>12</b>	<b>115</b>
<b>Grand Total</b>	<b>92</b>	<b>3</b>	<b>58</b>	<b>14</b>	<b>0</b>	<b>20</b>	<b>187</b>

**Standards of Review for Appeals by Case Type**

**Business and Occupation Tax Appeals**

The Director's assessment or refund denial "shall be regarded as prima facie correct, and the person shall have the burden to prove that the tax assessed or paid by him is incorrect". (SMC 5.5.55.140)

**Civil Service Appeals**

For terminations, demotions and suspensions, the department must show (normally by a preponderance of the evidence) that its decision or action was for justifiable cause. (Civil Service Commission Rule 5.31)

**Discrimination**

No Code provision on burden of proof, so the default is to Rule 2.29 of the Hearing Examiner Rules for Discrimination Cases: The Department "has the burden of proving a prima facie case against the respondent" and "the standard of proof is a preponderance of the evidence."

**Land Use Code Interpretation Appeals**

The Director's interpretation "shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant." (SMC 23.88.020)

### **Licensing Appeals (Adult Entertainment)**

No Code provision on burden of proof, so the default is to Hearing Examiner Rule 3.17: “The department must make a prima facie showing that its decision or action complies with the law authorizing the decision or action.” The appellant must then show by a preponderance of the evidence that the department’s decision or action does not comply with the applicable law.

### **Master Use Permit Appeals (most land use permits and most SEPA appeals)**

The appeal “shall clearly identify each component of a ... permit being appealed” and state “specific objections to the Director’s decision and the relief sought”. The Director’s decision “shall be given substantial weight, except for determinations on variances, conditional uses, and special exceptions, which shall be given no deference.” (SMC 23.76.022)

### **Public Nuisance**

The Director has the “burden to prove by a preponderance of the evidence that the property contains graffiti, that the person issued the notice is a responsible party, that the required abatement is reasonable, and that the required abatement has not been completed prior to the date established in the notice [of civil violation].” (SMC 10.07.050)

### **School Reuse and Departures**

The decision of the Director “shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant. (SMC 23.78.014 and SMC 23.79.012)

### **SEPA Only Appeals (no MUP)**

“The determination appealed from shall be accorded substantial weight and the burden of establishing the contrary shall be upon the appealing party.” (SMC 25.05.680)

### **Special Review District Appeals (Pike Place Market, Pioneer Square, etc.)**

Varies by district: “Hearing Examiner may reverse or modify the action of the Commission only if the Hearing Examiner finds that the action of the Commission violates the terms of the Code or rules, regulations or guidelines adopted” pursuant to it (Pike Place Market, SMC 25.24.080); “The decision appealed may be reversed or modified only if the Hearing Examiner finds that the Department of Neighborhoods Director’s decision was arbitrary and capricious.” (Pioneer Square, SMC 23.66.030)

### **Tenant Relocation Assistance Appeals**

No Code provision on burden of proof. Defaults to Hearing Examiner Rule 3.17: “The department must make a prima facie showing that its decision or action complies with the law authorizing the decision or action.” The appellant must then show by a preponderance of the evidence that the department’s decision or action does not comply with the applicable law.

### **Citation Appeals (DPD/Land Use Code and SDOT/Use of Public Property)**

The certified citation “shall be prima facie evidence that a violation occurred and that the person cited is responsible. The certified [citation] of the inspector ... and any other evidence accompanying the report shall be admissible without further evidentiary foundation. Any certifications or declarations authorized under RCW 9A.72.085 shall also be admissible without further evidentiary foundation. The person cited may rebut the [DPD/SDOT] evidence and establish that the cited violation(s) did not occur or that the person contesting the citation is not responsible for the violation. If the citation is sustained at the hearing, the Hearing Examiner shall enter an order finding that the person cited committed the violation. If the violation remains uncorrected, the Hearing Examiner shall impose the applicable penalty.” (SMC 32.91.012 & SMC 15.91.012)

## HEARING EXAMINER JURISDICTIONS

### **LAND USE & ENVIRONMENTAL** [Administered by Department of Planning and Development]

#### Appeals:

- Downtown Housing Maintenance appeals (SMC 22.220.140)
- Environmental Determinations (SMC 25.05.680)[Admin. by any City dept. as lead agency]
  - Determinations of Non-Significance (DNS)/ No EIS required (SMC 25.05.340)
  - Determinations of EIS Adequacy (SMC 25.05, Subchp. IV)
  - SEPA Conditions in MUP decisions (SMC 25.05.660)
- Fire & Safety Standards Citations (SMC 22.207.006)
- Land Use Code Citations (SMC 23.91.006)
- Land Use Code Interpretations (SMC 23.88.020)
- Master Use Permit [Type II] land use decisions (SMC 23.76.022):
  - Administrative Conditional Uses
  - Consistency with Planned Action Ordinance
  - Design Review
  - Establishing Light Rail Transit Facilities
  - Establishing Monorail Transit Facilities
  - Major Phased Developments
  - Short Subdivisions
  - Special Exceptions
  - Temporary Uses
  - Variances
- Building Unfit for Habitation (SMC 22.208.050)
- Environmentally Critical Areas Reasonable Use Exceptions (SMC 25.09.300)
- Housing & Building Maintenance Code violations (SMC 22.208.050)
- Pioneer Square Minimum Maintenance violations (SMC 25.28.300)
- Relocation Assistance: (City action causes displacement) (SMC 20.84.160)
- Stop Work Orders (SMC 23.76.034)
- Stormwater, Grading & Drainage exceptions/enforcement (SMC 22.808.040)
- Tenant Relocation Assistance Eligibility Determinations (SMC 22.210.150)

#### Original Jurisdiction [Type III] land use decisions (DPD rec., Hearing Examiner decision)

- Subdivisions (SMC 23.76.024 and SMC 23.22.052)

#### Recommendations to Council on Type IV land use decisions (SMC 23.76.036):

- Council Conditional Uses
- Downtown Planned Community Developments
- Major Institution Master Plans
- Public Facilities Master Plans
- Rezone Petitions

### **SCHOOL REUSE & DEPARTURES** [Administered by Department of Neighborhoods]

- School Development Standard Departures (SMC 23.79.012) within MUP decision
- School Reuse/SUAC (SMC 23.78.014) within MUP decision

### **CIVIL RIGHTS COMPLAINTS** [Administered by the Office of Civil Rights]

- Employment Discrimination Complaints (SMC 14.04.170)
- Fair Housing/Business Practice Complaints (SMC 14.08.170)
- Public Accommodations Complaints (SMC 14.06.110)

### **CONTRACTUAL RELATIONS** [Administered by the Executive Administration]

- Boost Program Sanctions (SMC 20.49.100)
- WMBE Sanctions (SMC 20.46A.190)

## **PUBLIC NUISANCE**

- Graffiti Nuisance Violations (SMC 10.07.050) [Administered by Seattle Public Utilities]
- Public Nuisance Abatements (SMC 10.09.100) [Administered by Seattle Police Department]

## **LANDMARKS AND SPECIAL DISTRICTS** [Administered by the Dept. of Neighborhoods]

- Certificates of Approval for Designated Landmarks (SMC 25.12.740)
- Landmark Controls & Incentives (SMC 25.12.530) [Recommendations to City Council]
- Landmarks Code Interpretations (SMC 25.12.845)
- Special Review Districts' Certificate of Approval and Code Interpretations
  - Pioneer Square Historical District (SMC 23.66.030)
  - International District (SMC 23.66.030)
  - Pike Place Market Historical District (SMC 25.24.080 & SMC 25.24.085)
  - Harvard Belmont Landmark District (SMC 25.22.130 & SMC 25.22.135)
  - Ballard Avenue Landmark District (SMC 25.16.110 & SMC 25.16.115)
  - Columbia City Landmark District (SMC 25.20.110 & SMC 25.20.115)

## **HEALTH CODE VIOLATIONS** [Administered by Seattle-King County Public Health]

- Health Code Permit actions (SMC 10.01.220)
- Noise Ordinance variance appeals (SMC 25.08.770) and citation appeals (SMC 25.08.910) [Administered by DPD]
- Radiofrequency Radiation Ordinance violations (SMC 25.10.540)

## **CITY TAXES AND LICENSES** [Admin. by Executive Admin., Revenue & Consumer Affairs]:

- Admission Tax Exemptions (SMC 5.40.085)
- All Ages Dance and Venues (SMC 6.295.180)
- Bond Claims (SMC 6.202.290)
- Business and Occupation Tax assessments (SMC 5.55.140)
- Horse Drawn Carriage Licenses (SMC 6.315.430)
- License denials, suspensions & revocations (SMC 6.02.080, 6.02.290 and 6.202.270)
  - Adult Entertainment (SMC 6.270)
  - For-Hire Vehicles & Drivers (SMC 6.310.635)
  - Pawnshops (SMC 6.288)
  - Panorama and Peepshows (SMC 6.42.080)
  - Unit Pricing (SMC 7.12.090)
- Animal Control:
  - Animal License Denials (SMC 9.25.120)
  - Determinations of Viciousness/Order of Humane Disposal (SMC 9.25.036)

## **CABLE COMMUNICATIONS** – [Administered by the Office of Cable Communications]

- Franchise Termination (SMC 21.60.180)
- Rates and Charges Increases (SMC 21.60.310)

## **MISCELLANEOUS JURISDICTIONS**

- Civil Service Appeals (SMC 4.04.250) [Delegation from Civil Service Commission]
- Ethics Code Violations (SMC 3.70.100) [Delegation from Ethics & Elections Commission]
- Improvement District Assessment Appeals as provided by Ordinance
- LID Assessment Rolls (SMC 20.04.090) [Administered by Dept. of Transportation]
- Petitions for Review of Floating Home Moorage Fee Increase (SMC 7.20.080)
- Property Tax Exemption Elimination (SMC 5.72.110) [Administered by Office of Housing]
- Side Sewer Contractor Registration Appeal (SMC 21.16.065) [Admin. by SPU]
- SDOT Citation Appeals (SMC 15.91.006) [Admin. by Dept. of Transport.]
- Street Use Appeals (SMC 15.90) [Admin. by Dept. of Transport.]
- Tax Refund Anticipation Loan Complaints (SMC 7.26.070)
- Third Party Utility Billing Complaints (SMC 7.25.050)